MALAYSIAN ASSURANCE ALLIANCE BHD A

v.

COMSA PROPERTIES SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
MOHAMED APANDI ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02(NCC)-1307-2010
& S-02-1616-2010] C
4 JULY 2011

COMPANY LAW: *Winding up - Petition - Dismissal - Appeal against - Whether leave required before challenge mounted against winding up order - Companies Act 1965, s. 253 - Whether creditor has right to appear in a winding up petition against company - Judge summarily dismissed appellant as a party in petition - Whether judge in error of jurisprudence in s. 221(2) Companies Act 1965 - Whether there was a violation of r. 28 Companies (Winding-Up) Rules 1972 - Whether respondent principally liable for debt owing and subject to winding up petition* D E

COMPANY LAW: *Winding up - Appointment of liquidator - Rights of creditor - Right of opportunity to be heard - Whether appellant as substantial creditor of respondent entitled to participate in appointment of liquidator* F

The two appeals herein arose from two different decisions in two different High Courts, namely, in Kuala Lumpur High Court (hereinafter referred to as NCC appeal) and in Kota Kinabalu High Court (hereinafter referred to as KK appeal). In both G appeals, there was a common appellant, namely Malaysian Assurance Alliance Berhad (MAA), who had served a statutory notice of demand pursuant to s. 218(2) of the Companies Act 1965 on the respondent (Comsa) that led to these appeals. The two appeals were heard together. In the NCC appeal, the H respondent was Comsa Properties Sdn Bhd. In the KK appeal, the respondents were El Nutrition Sdn Bhd and Comsa Properties Sdn Bhd. Although the factual matrix of both appeals were inter-related, the thrust of the appeals were different. In the NCC appeal, the contention was against the dismissal of the petition to I wind up the respondent (Comsa) whereas in the KK appeal the contention was over the appointment of the liquidator and the

court's refusal to recognise the appellant as a creditor. The legal issues that arose in these appeals were (i) whether leave was required before any challenge could be mounted against a winding up order; (ii) whether a creditor has the right to appear in a second winding up petition against the same company; (iii) whether Comsa's liability secondary in nature and therefore not subject to a winding up petition and whether MAA as a secured creditor that opted not to proceed with foreclosure proceeding was prevented from filing a winding up petition and (iv) whether MAA was a substantial creditor of Comsa and entitled to participate in the appointment of the liquidator of Comsa.

Held (allowing the appeals)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) To challenge the issue of requirement of leave before challenging a winding-up order, it is pertinent to refer to the powers of the court relating to such matter (s. 253 of the Companies Act 1965). When a company has a right to be heard to say that the winding up order is wrong and to appeal against the order (*Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd*) surely such right to be heard must equally be given to creditors who are not satisfied with any order related to such winding up order. An aggrieved company that has been wound up has the right to appeal (*Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals*; *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*). Thus, leave was not required before any challenge could be mounted against a winding up order. (para 5)

(2) The appellant was a secured creditor of Comsa. The appellant had all the right to file the winding-up petition in the NCC Court on 9 December 2009. The respondent was wound up by the Kota Kinabalu High Court on 26 April 2010. In the Kota Kinabalu Court winding up hearing, the appellant did file a notice of intention to appear on 22 April 2010. In such circumstances, the Kota Kinabalu High Court ought to have exercised its powers under s. 221(2) of the Companies Act 1965 at the hearing of the Kota Kinabalu petition. The learned judge in summarily dismissing the appellant as a party in the KK petition was in error of the jurisprudence in s. 221(2) of the Companies Act 1965 and also in violation of

the purpose and intention of the notice of intention to appear, provided for under r. 28 of the Companies (Winding-Up) Rules 1972. (para 5)

(3) On the facts, there was sufficient evidence to show contractual clauses that made Comsa principally liable for the debt owing to the appellant. Thus, Comsa was subject to a winding up petition. The law is very clear as to proof of debts in any winding-up proceedings (s. 291 of the Companies Act 1965). The law is made clearer by s. 42 and the rules in sch. C of the Bankruptcy Act 1967. (para 5)

(4) The appellant was a substantial creditor of Comsa, thus it must naturally follow that the appellant had the right in the choice of the liquidator of Comsa. The rule of fair play demands that a liquidator should be independent and also seen to be independent. To be one, the views of creditors must be taken into consideration. When there exists opposing views on the appointment of a liquidator, the winding up court ought to give due consideration to all the views. The appellant herein had indeed been denied its basic right of opportunity to be heard. The law is very clear as to the rights of the appellant, as a substantive creditor. (para 5)

(5) The respondent's (Comsa) action was tainted with insincerity as could be seen in these two pertinent facts (i) the respondent had vehemently opposed the winding up petition in the NCC case in KL, on the grounds that the respondent was solvent. Whereas in the KK case, the respondent had willingly consented to the winding up petition. These varying standards were paradoxical; (ii) the respondent did not disclose the existence of the KK case at the material time of filing the affidavit in opposition to the NCC case, when such affidavit was filed after receiving the winding-up petition in KK. This non-disclosure was a reflection of insincerity amounting to an act of *mala fide*. The whole scenario amounted to an abuse of the court process; namely to frustrate and subvert the appellant from pursuing their legal remedies against the respondent (Comsa). (paras 6 & 7)

[In respect of the NCC Appeal, it was allowed with costs and order granted in terms of prayers (a) and (b) of the petition together with the ancillary order prayed for. In respect of the KK Appeal, in allowing it, the winding up proceeding was held to be a nullity and the proceedings and any order made therein set aside].

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Kedua-dua rayuan di sini timbul dari dua keputusan berlainan dalam dua Mahkamah Tinggi berbeza, iaitu, di Mahkamah Tinggi Kuala Lumpur (dirujuk sebagai Rayuan NCC) dan di Mahkamah
B Tinggi Kota Kinabalu (dirujuk sebagai Rayuan KK). Di dalam kedua-dua rayuan, terdapat satu perayu yang sama, iaitu Malaysian Assurance Alliance Berhad (MAA), yang telah menyerahkan satu notis tuntutan berkanun di bawah s. 218(2) Akta Syarikat 1965 ke atas responden (Comsa) yang membawa
C kepada rayuan-rayuan ini. Kedua-dua rayuan dibicarakan bersama. Di dalam Rayuan NCC, responden adalah Comsa Properties Sdn Bhd. Di dalam Rayuan KK, responden-responden adalah El Nutrition Sdn Bhd dan Comsa Properties Sdn Bhd. Walaupun acuan fakta kedua-dua rayuan adalah berkait, inti rayuan-rayuan
D adalah berbeza. Di dalam Rayuan NCC, hujahan adalah terhadap penolakan petisyen untuk menggulung responden (Comsa) manakala dalam Rayuan KK hujahan adalah mengenai perlantikan likuidator dan keengganan mahkamah untuk mengiktiraf perayu sebagai pemiutang. Isu undang-undang yang timbul di dalam
E rayuan-rayuan ini adalah (i) sama ada kebenaran diperlukan sebelum apa-apa cabaran terhadap petisyen perintah penggulungan dimulakan; (ii) sama ada pemiutang mempunyai hak untuk menghadirkan diri di petisyen penggulungan kedua terhadap syarikat yang sama; (iii) sama ada liabiliti Comsa adalah bersifat
F sekunder dan oleh itu tidak tertakluk kepada satu petisyen penggulungan dan sama ada MAA sebagai pemiutang yang dijamin yang memilih untuk tidak meneruskan prosiding halangtebus dilarang dari memfailkan petisyen penggulungan dan (iv) sama ada MAA sebagai pemiutang yang dijamin Comsa berhak untuk
G mengambil bahagian dalam perlantikan likuidator Comsa.

Diputuskan (membenarkan rayuan):
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

H **(1)** Untuk mencabar isu keperluan kebenaran sebelum mencabar petisyen penggulungan, kuasa-kuasa mahkamah berhubungan perkara itu harus dirujuk (s. 253 Akta Syarikat 1965). Apabila syarikat mempunyai hak untuk didengar untuk menyatakan bahawa perintah penggulungan adalah salah dan untuk merayu
I terhadapnya (*Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd)* tentu hak sedemikian untuk didengar mestilah sama diberi

kepada pemiutang-pemiutang yang tidak puas hati dengan apa-apa perintah berhubungan perintah penggulungan. Syarikat yang terkilan yang telah digulung mempunyai hak untuk merayu (*Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals*; *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*). Oleh itu, kebenaran tidak diperlukan sebelum apa-apa cabaran boleh dimulakan terhadap perintah penggulungan.

(2) Perayu adalah pemiutang yang dijamin Comsa. Perayu mempunyai hak untuk memfailkan petisyen penggulungan di dalam Rayuan NCC pada 9 Disember 2009. Responden telah digulungkan oleh Mahkamah Tinggi Kota Kinabalu pada 26 April 2010. Di dalam perbicaraan penggulungan Mahkamah Kota Kinabalu, perayu telah memfailkan notis niat untuk hadir pada 22 April 2010. Dalam keadaan sedemikian, Mahkamah Tinggi Kota Kinabalu sepatutnya melaksanakan kuasa-kuasanya di bawah s. 221(2) Akta Syarikat 1965 di perbicaraan petisyen Kota Kinabalu. Yang arif hakim bicara dalam menolak secara terus perayu sebagai pihak di dalam petisyen KK telah melakukan kesalahan jurisprudens di dalam s. 221(2) Akta Syarikat 1965 dan telah mencabul niat dan tujuan notis niat untuk hadir, yang disediakan di bawah k. 28 Kaedah-Kaedah (Penggulungan) Syarikat 1972.

(3) Atas fakta-fakta, terdapat keterangan mencukupi untuk menunjukkan klausa-klausa kontraktual yang membuat Comsa bertanggungjawab bagi hutang yang dihutang kepada perayu. Oleh itu, Comsa tertakluk kepada petisyen penggulungan. Undang-undang memang jelas mengenai bukti-bukti hutang di dalam mana-mana prosiding penggulungan (s. 291 Akta Syarikat 1965). Undang-undang dibuat jelas lagi oleh s. 42 dan kaedah-kaedah di dalam Jadual C Akta Kebankrapan 1967.

(4) Perayu adalah pemiutang kukuh Comsa, oleh itu secara semulajadinya perayu mempunyai hak dalam pemilihan likuidator Comsa. Kaedah-kaedah sikap adil memerlukan likuidator bebas dan dilihat sebagai bebas. Untuk menjadi itu, pandangan pemiutang-pemiutang mesti dipertimbangkan. Apabila wujudnya pandangan-pandangan bertentangan mengenai perlantikan likuidator, mahkamah penggulungan harus mempertimbangkan semua pandangan-pandangan. Perayu di sini telah dinafikan hak asasnya untuk diberi peluang didengari. Undang-undang adalah jelas mengenai hak-hak perayu, sebagai pemiutang yang kukuh.

(5) Tindakan responden (Comsa) telah dicemarkan dengan ketidakjujuran seperti yang dilihat dari dua fakta ini (i) responden telah membantah secara kuat petisyen penggulungan di dalam kes NCC di KL, atas sebab-sebab bahawa responden adalah solven. Manakala di dalam kes KK, responden telah secara rela bersetuju dengan petisyen penggulungan. Taraf-taraf yang berbeza ini adalah bertentangan; (ii) responden tidak mendedahkan kewujudan kes KK pada masa yang material apabila memfailkan afidavit menentang kes NCC, di mana afidavit sebegitu difailkan selepas penerimaan petisyen penggulungan di KK. Ketakdedahan tersebut mencerminkan ketidakjujuran yang membawa kepada satu tindakan *mala fide*. Keseluruhan senario itu berjumlah kepada suatu penyalahgunaan proses mahkamah; iaitu untuk menggagalkan dan menyalaharahkan perayu daripada menuntut remedi-remedi undang-undang terhadap responden (Comsa).

[Mengenai rayuan NCC, ia dibenarkan dengan kos dan perintah diberi mengikut terma-terma permohonan (a) dan (b) petisyen bersama -sama dengan perintah sampingan yang dipohon. Mengenai rayuan KK, dalam membenarkannya, prosiding penggulungan dibatalkan dan prosiding-prosiding dan apa-apa perintah yang dibuat diketepikan.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***

Four Pillows Enterprise Co Ltd v. Beiersdorf Aktiengesellschaft [1999] 1 SLR 737 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Re Dunquil Pty Ltd (In liq) [1985] 3 ACLC 606 ***(refd)***

Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 42
Companies Act 1965, ss. 218(2), 221(2), 253, 291
Companies (Winding-up) Rules 1972, r. 28

(Civil Appeal No: W-02(NCC)-1307-2010)

For the appellant - Vinayaga Raj Rajaratnam (Vijay Raj with him); M/s Skrine & Co

For the respondent - Paramalingam (Mohd Rizal Bahari with him); M/s Bahari & Bahari

(Civil Appeal No: S-02-1616-2010)
For the appellant - Christopher KH Chong; M/s Lind Willie Wong & Chin
For the 1st respondent - Paul Chin; M/s Paul Chin & Co
For the 2nd respondent - absent

[Appeals from High Court, Kuala Lumpur; Companies (Winding-up) No: D-28-NCC-283-2009 & High Court, Kota Kinabalu; Companies (Winding-up) No: K28-09-2010-III]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] There are two appeals in this case and they arose from two different decisions in two different High Courts, namely in Kuala Lumpur and Kota Kinabalu. The appeal from the Kuala Lumpur High Court is W-02(NCC)-1307-2010 and the one from Kota Kinabalu High Court is S-02-1616-2010. In both appeals there is a common appellant, namely Malaysian Assurance Alliance Berhad. The two appeals were heard together. For ease of reference, the Kuala Lumpur and the Kota Kinabalu appeals shall be referred to as the NCC appeal and KK appeal respectively.

[2] In the NCC appeal, the respondent is Comsa Properties Sdn Bhd. In the KK appeal, the respondents are El Nutrition Sdn Bhd and Comsa Properties Sdn Bhd. Although the factual matrix of both appeals are inter-related the thrust of the appeals are different. In the NCC appeal, the contention was against the dismissal of the petition to wind-up the respondent (Comsa) whereas in the KK appeal the contention is over the appointment of the liquidator and the court's refusal to recognize the appellant as a creditor. We allowed both appeals by the appellant and now give our reasons.

Facts Leading To Appeals

[3] To fully appraise the legal issues in both appeals, it is appropriate to list in chronological order the events leading to the appeals. They are as follows:

A (a) The appellant, Malaysian Assurance Alliance Berhad (MAA) served a statutory notice of demand pursuant to s. 218(2) of the Companies Act 1965, on the respondent (Comsa) on 17 June 2009 at its registered office in Tawau.

B (b) A wind-up petition against Comsa was filed at the NCC Court Kuala Lumpur on 9 December 2009 and served on Comsa's solicitors on 19 January 2010.

(c) On 24 February 2010 the 1st respondent in the KK appeal, as a creditor of Comsa filed a wind-up petition against Comsa C at the Kota Kinabalu High Court.

(d) In the meantime, the NCC petition came up for hearing on 13 April 2010. The respondent opposed the petition and *inter alia* argued that they are not insolvent. The respondent D (Comsa) in their affidavit in opposition dated 8 March 2010 did not mention about the KK petition, even though it was filed after the filing of the said petition (ie, on 24 February 2010.)

E (e) On 22 April 2010, two days before the hearing of the KK petition, the appellant filed a notice of intention to appear at the said hearing. It was also intimated that MAA wishes to support the petition.

F (f) On 26 April 2010, with Comsa as the respondent not objecting to the petition, the Kota Kinabalu High Court ordered order in term of the winding-up petition. At 26 April 2010 proceedings, MAA objected to the appointment of a private liquidator but the objection was overruled. The High Court also ruled that MAA had no right to appear in G the said proceedings.

Legal Issues

[4] The legal issues that arose in these appeals are:

H (i) Whether leave is required before any challenge can be mounted against a winding-up order?

(ii) Does a creditor have the right to appear in a second winding-up petition against the same company?

I (iii) Is Comsa's liability secondary in nature and therefore not subject to a wind-up petition;

(iv) Whether MAA as a secured creditor that opted not to proceed with foreclosure proceeding is prevented from filing a wind-up petition; and

(v) Whether MAA is a substantial creditor of Comsa and entitled to participate in the appointment of the liquidator of Comsa.

Our Findings

[5] Upon perusal of the Appeal Records and after hearing the respective submissions of all parties, we made the following findings on the issues as listed above:

(i) To address the issue of requirement of leave before challenging a Wind-up Order, it is pertinent to refer to the powers of the court relating to such matter. This can be seen in s. 253 of the Companies Act 1965, which reads as follows:

> 253. Power of Court cumulative.
>
> (1) Any powers by this Act conferred on the Court shall be in addition to and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company or the estate of any contributory or debtor for the recovery of any call or other sums.
>
> (2) Subject to the rules an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction.

The Supreme Court in *Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436, *inter alia*, held that:

> After a winding-up order is made generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order.

Corollary to that when such right is given to the company that is subject to winding-up, surely such right to be heard must equally be given to creditors who are not satisfied with any order related to such winding-up order.

A The right to appeal by the aggrieved company that has been wound up has been strongly put by Justice Gopal Sri Ram in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, in which he said: "To conclude this point, it is my judgment beyond B argument that a company which has been ordered to be wound up has a right of appeal against such order and to make any and all applications within the appeal, including an application for a stay of the winding up order. Any decision to the contrary is wrong and should not be followed."

C On this issue, we are also mindful of the Federal Court decision of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, where, *inter alia*, it was held:

> D It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist.

E Based on the above reasoning, our answer to issue (i) is in the negative.

(ii) On the facts of the case, the appellant is a secured creditor of Comsa. The appellant has all the right to file the wind-up F petition in the NCC court, which was done on 9 December 2009. The respondent was wound-up by the Kota Kinabalu High Court on 26 April 2010. In the Kota Kinabalu Court winding-up hearing the appellant did file a notice of intention to appear, on 22 April 2010. In such circumstances the High G Court in Kota Kinabalu, at the hearing of the Kota Kinabalu Petition ought to have exercised its powers under s. 221(2) of the Companies Act 1965. Section 221(2) reads as follows:

> (2) The Court may on the petition coming on for hearing or at H any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition:
>
> (a) direct that any notices be given or any steps taken before or after the hearing of the petition;

I

(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;

(c) direct that oral evidence be taken on the petition or any matter relating thereto;

(d) direct a speedy hearing or trial of the petition or any issue or matter;

(e) allow the petition to be amended or withdrawn; and

(f) give such directions as to the proceedings as the Court thinks fit.

The last para. (f) is meant as a catch-all provision, to ensure justice is done in whatever circumstances.

This has been elaborately discussed in the case of *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405.

The learned judge in summarily dismissing the appellant as a party in the KK petition is in error of the jurisprudence in the above cited s. 221(2) of the Companies Act 1965 and also in violation of the purpose and intention of the Notice of Intention to Appear, that is provided for under r. 28 of the Companies (Winding-up) Rules 1972. Our view on this is fortified by the case of *Four Pillows Enterprise Co Ltd v. Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737, where the Court of Appeal held that:

> It is not expressly stated in r 28, or any other provision of the Winding Up Rules, whether a person who has served on the petitioner such a notice becomes a 'party to the proceedings'. The purpose of this rule is to give the party who has served the notice - normally a creditor or contributory - a right to be heard before the court decides whether or not to make the order for winding up of the company. By serving the notice, the appellants had acquired the rights (i) to appear before the court and to be heard; (ii) to file an affidavit in opposition to the petition; (iii) to receive any affidavits in reply to his affidavit; (iv) to apply to the court for the orders and directions enumerated in s 257(2) of the Companies Act; and (v) to appeal against the winding up order. The court may well make an order in favour of or against such party, eg an order as to costs.

A In our opinion, the appellants by filing and serving on the respondents the notice of their intention to appear had become a party to the proceedings.

For these reasons, our answer to issue (ii) is in the positive.

B (iii) On this issue, this is actually a non issue. On the facts, there is sufficient evidence to show contractual clauses that make Comsa principally liable for the debt owing to the appellant. We, therefore give a positive answer to issue (iii).

C (iv) On this issue, the law is very clear as to proof of debts in any winding-up proceedings. This can be seen in s. 291 of the Companies Act 1965, which reads as follows:

291. Proof of debts.

D (1) In every winding up, subject in the case of insolvent companies to the application in accordance with this Act of the law relating to bankruptcy, all debts payable on a contingency and all claims against the company present or future certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the E company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reasons do not bear a certain value.

F (2) Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to G bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and received dividends out of the assets of the company may come in under the winding up and make such claims against the company as they H respectively are entitled to by virtue of this section.

The above law is made clearer by s. 42 and the rules in Schedule C of the Bankruptcy Act 1967. Section 42 reads:

42. The rules in Schedule C shall be observed with respect I to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs and other matters.

The proof of debts in respect of secured creditors is governed by paras. 9, 10 and 11 of sch. C of the said s. 42. The relevant paragraphs of sch. C read as follows:

Proof by Secured Creditors

9. If a secured creditor realizes his security he may prove for the balance due to him after deducting the net amount realized.

10. If a secured creditor surrenders his security to the Official Assignee for the general benefit of the creditors he may prove for his whole debt.

11. If a secured creditor does not either realize or surrender his security he shall state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

Applying the above law to the facts of the case, we would answer issue (iv) in the positive.

(v) On this last issue, having concluded that the appellant is a substantial creditor of Comsa, it must naturally follow that the appellant do have the right in the choice of the liquidator of Comsa. The rule of fair play demands that a liquidator should be independent and also seen to be independent. To be one, the views of creditors must be taken into consideration. When there exist opposing views on the appointment of a liquidator, the winding-up court ought to give due consideration to all the views. On this it is suffice for us to quote what was held in the case of *Re Dunquil Pty Ltd (In Iiq)* [1985] 3 ACLC 606, which reads:

> There can be little doubt that, where it appears that a company is hopelessly insolvent, the views of the creditors, whilst by no means binding upon the Court, must nevertheless be given due weight - for it is they and not the shareholders of the company who have the primary interest in the ultimate outcome of the liquidation. So much is abundantly plain from the judgment of Needham J. in *Re Pacific Acceptance Corporation Ltd.* [1977] 2 ACLR 528. Indeed, in that case, his Honour went so far as to say that it is the duty of the Court "to give no weight or little weight to the desires of the company". Needham J.

reiterated that sentiment in *Re Nuham Ltd* [1980] 5 ACLR 69 at p. 75. He particularly stressed, in the latter case, that the appointment must be such as to "allay any fears of creditors who are unwilling to have particular persons appointed because of suspected previous contact with the companies". That view was assented to by Bowen CJ in Eq in *Re Stewden Nominees No. 4 Pty Ltd* [1975-1976] CLC 140-224; [1975] 1 ACLR 185 when he commented, "It is important that a liquidator should be independent, and should be seen to be independent". Such a sentiment was strongly reiterated by Mahoney JA in *Brian Cassidy Electrical Industries Pty Ltd (In Prov Liq) & Anor v. Attalex Pty Ltd* [1984] 2 ACLC 752 at p. 765; [1985] 9 ACLR 289 at p. 303.

Those opinions accord with the dictates of sound common sense and I agree with Mr Robertson of counsel for the appellant that they are, in reality, an extension of the statutory concepts written into sec. 397 and 400 of the Code dealing with members and creditors voluntary windings up. True it is, as was submitted by counsel for the Company, that the latter type of winding up does not involve the interposition of the Court and its officer. However I fail to see how that fact, of itself, in any way dilutes the fundamental premise that it is the creditors' interest which become paramount in a situation of insolvency and it ill behooves a company and/or its members in such circumstances to seek at all costs to retain the initiative on such a vital issue - the more as the actions of principals and officers of the Company must necessarily come under close scrutiny. In such circumstances it is proper for creditors to insist that any proposal for appointment of an official liquidator emanating from the Company be rigorously examined.

I also accept Mr Robertson's submission that, in an official liquidation, there is also necessarily a public interest element. To adopt the words of Street J (as he then was) in *Re Allebart Pty Ltd* [1971] 1 NSWLR 24 at p. 24 and recited by McHugh JA in the *Brian Cassidy* case *(supra)* at p. 314:

> A court winding up involves more than mere realization of the assets and distribution of proceeds. The official liquidator is an officer of the court and as such he has public responsibilities to investigate past activities connected with the Company and, in appropriate cases, to initiate such further proceedings, civil or criminal,

> connected therewith as the circumstances may dictate. It is his duty to discover not only breaches of the Companies Act, but also conduct falling short of the requisite standards of commercial morality.
>
> It follows that such a concept strongly reinforces the need to scrutinize with great care any proposal to appoint as official liquidator any person who has had a prior nexus with the relevant company and to give due recognition to the legitimate fears and perceptions of a substantial body of the creditors.

The fact on the controversy over the appointment of the liquidator is almost similar to the facts in the appeal before us.

For the above reasons, over answer to issue (v) is in the positive.

Conclusion

[6] From the factual matrix of the case as chronologically listed above, we find that the appellant has indeed been denied its basic right of opportunity to be heard. The law is very clear as to the rights of the appellant, as a substantive creditor.

[7] From the facts as disclosed in the affidavits in the Appeal Records, we observed that the respondent's (Comsa) action is tainted with insincerity. This can be seen in two pertinent facts:

(i) The respondent vehemently opposed the winding-up petition in the NCC case in KL, on the grounds that the respondent is solvent. Whereas in the *KK* case the respondent willingly consented to the winding-up petition. These varying stands are paradoxical!

(ii) The respondent did not disclose the existence of the *KK* case at the material time of filing the affidavit in opposition in the *NCC* case, when such affidavit was filed after receiving the winding-up petition in KK. This non-disclosure is a reflection of insincerity amounting to an act of *mala fide*.

The whole scenario amounted to an abuse of the court process; namely to frustrate and subvert the appellant from pursuing their legal remedies against the respondent (Comsa).

A **[8]** For the above reasons on the issues involved, we have no hesitation to allow the appeals by the appellant. In respect of the NCC appeal, we allow the appeal with costs and granted order in terms of prayers (a) and (b) of the petition together with the ancillary order prayed for. In respect of the KK appeal, in allowing
B the appeal, we hold that the winding-up proceeding is a nullity and set aside the proceedings and any order made therein.

[9] The orders in respect of costs are as pronounced at the open court hearing of the two appeals. Deposits for the appeals
C are to be refunded to the appellant.

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